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IN THE

Supreme Court of the United States

October Term, 1965

No. 66

KALMAN J. BERENYI,

Petitioner,

v.

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit which affirmed an order of the United States District Court for the District of Massachusetts denying the petitioner's petition for naturalization.

Opinions Below

The opinion of the Court of Appeals which is reproduced in Appendix A, hereto, is reported at 352 F. 2d 71. The opinion of the District Court (A 259-265)* which contained its findings of facts and conclusions of law, is reported at 239 F. Supp. 725.

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* Refers to pages of Petitioner's Appendix in Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on November 1, 1965 and is reproduced in Appendix B, hereto. This Court's jurisdiction arises under 28 U.S. Code, section 1254(1).

Questions Presented

I. Whether the Court of Appeals ererd in upholding the District Court's findings of fact that the petitioner was a member of the Communist Party of Hungary and that he therefore testified falsely in denying same, and that he was thus not a person of good moral character within the meaning of the Immigration and Nationality Act.

A. Whether in the context of the entire record, the evidence adduced against the petitioner constituted substantial evidence upon which a finding of Communist Party membership would not be clearly erroneous.

II. Whether in light of this Court's decisions in *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, *Rowoldt* v. *Perfitto*, 355 U.S. 115 and *Scales v. United States*, 367 U.S. 203, 222, it was error for the Court of Appeals to uphold a finding of Communist Party membership in a naturalization proceeding without evidence that such membership consisted of a "meaningful association."

Statutes Involved

(1) Section 101(f)(6) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1101 (f)(6), provides in part:

"(f) For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;"

(2) Section 313(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1424(a)(2), provides in part:

"(a) Notwithstanding the provisions of section 405 (b) of this act, no person shall hereafter be naturalized as a citizen of the United States—

(2) who is a member of or affiliated with (A) the Communist Part of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party or any State of the United States, of any foreign state, or any political or geographical subdivision of any foreign state; * * * ".

(3) Section 316(a) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1427(a), provides in part:

"(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing of his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years, and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half

of that time, and who has resided in the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

(4) Rule 52(a) of the Federal Rules of Civil Procedure provides:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Statement of the Case

A. Administrative Proceedings

On January 30, 1962, the petitioner filed a petition for naturalization (A 259). After an extended preliminary hearing conducted pursuant to Title 8 U. S. C. Section 1446, a designated naturalization Examiner recommended to the District Court that the petition be denied on the grounds that the petitioner's membership in the Communist party of Hungary and his advocacy of the doctrines of Communism have rendered him ineligible for naturalization under Title 8 U.S.C. Section 1424, and that during the period for which the petitioner is required to establish good moral character, he testified falsely for the purpose of facilitating his naturalization thereby obtaining a benefit under the Immigration and Nationality Act and thus become ineligible for naturalization by virtue of the provisions of Title 8 U. S. C. Sections 1101 and 1427 (A 260, 261).

B. Proceedings in the District Court

The final hearing on the petitioner's application for naturalization was a joint proceeding involving the petitioner's application together with the petition for naturalization of his wife, Magdalena Retsagi Berenyi (A 3). Both petitioners testified in support of their own respective petitions and the petitions of each other. In addition, five other witnesses testified in support of the petitions for naturalization. The government produced two witnesses in opposition thereto.

Inasmuch as the testimony elicited was the vital determinative factor upon which the District Court's findings of

fact and conclusions of law were based, it is necessary to briefly summarize same herein.

1. Testimony in Support of Petition

The petitioner testified he was born in Hungary on August 27, 1928. He was baptized in the Roman Catholic faith, was given a strict religious upbringing by his parents and as late as 1947 at the age of 18 or 19 was still an altar boy in an order of Franciscan nuns. He is presently a practicing Catholic (A 82), and has never been politically active at all (A 92, 93).

In September of 1946, he was admitted to the University of Budapest Medical School (A 83). At that time the school was not under complete Communist control, but the Communists were in the government and there were Communist groups and organizations therein (A 83).

In 1949, while a medical student, he joined the Hungarian army which thereafter provided for his tuition in medical school (A 89). This was the only way in which he could complete his education inasmuch as his parents were poor people and could not provide his expenses throughout (A 90). It was not necessary to be a member of the Communist party to be in the armed forces and a great many non-Communists were similarly in the army (A 89). This fact was confirmed by the government witness Kury (A 62, 63).

While a medical student and also a member of the army, he was approached by members of the party and urged to join (A 86). However, petitioner never joined the party nor did he ever attend any closed meetings of the Communist party (A 84, 85, 86, 87). He attended open meet-

ings to which he was invited and at which other non-Communist, were present, wherein the Communists attempted to indoctrinate the students in Communist ideology (A 87). Such invitations were tantamount to an order and his attendance thereat was under fear of serious adverse consequences if he failed to do so (A 87). This too was confirmed by the testimony of the government witness Halasz who also stated that the petitioner was an outstanding student with respect to whom the Communists would have made every effort to recruit him into the party (A 24, 25, 29).

At about the time of his graduation in 1952, the petitioner married Magdalena Retsagi (A 91) a classmate at medical school whom he had met in 1948 (A 83). They were married in a religious ceremony though such rites were officially frowned upon (A 92).

Following graduation, the petitioner served as an officer in the medical corp of the army and was stationed as a medical officer at various locations (A 90). In 1956, he was promoted to Captain (A 90).

During the Hungarian uprising in October and November of 1956, the division in which the petitioner was serving fought the Russians, and petitioner was on duty treating people who were wounded in the fighting (A 100).

After the uprising was crushed, the petitioner sought to escape from Hungary at the risk of being caught as a deserter. He prevailed upon his commanding officer to furnish him with a document which would indicate that he was released from active duty. He realized that if he were stopped and examined such document would probably be of no avail, but he took the risk (A 93, 94, 95). The

original document was introduced in evidence as petitioner's Exhibit "A" and the translation thereof as Exhibit "B" (A 258). On November 19, 1956, petitioner, his wife and her aunt and uncle left Budapest and set out for the Austro-Hungarian border (A 94, 111). He and his wife took only their medical credentials and a change of clothes with them, leaving all of their furniture and personal possessions behind (A 95). Their escape from Hungary was vividly described in testimony by the petitioner, his wife and her aunt, Gertrude Farkas.

The petitioner and his wife spent several days in Austria and were thereafter flown to the United States where they were admitted for permanent residence on December 4, 1956 (A 96).

Following his arrival in this country, the petitioner immediately resumed his medical career at various hospitals in New York and New Jersey, fulfilling his internship and residency requirements thereat (A 96, 97). On July 1, 1959, petitioner and his wife moved to Massachusetts where they have resided since (A 97). He has taken and passed his medical state board examinations in Massachusetts, Illinois and Virginia (A 97). He passed his specialty board examination in anesthesiology in April of 1964 and is a board certified diplomate in anesthesiology (A 98). He has been and is presently associated with various hospitals in Massachusetts and has been a senior instructor on the staff of Tufts Medical School (A 97, 98).

The petitioner testified without reservation or hesitation to his opposition to Communism, his loyalty and attachment to the United States and the Constitution and his

willingness to fight and bear arms on behalf of this country (A 99, 100).

He categorically denied ever having made the statement attributed to him by Kury or that he was a political leader in any student study group or other group of any kind (A 88, 98, 99).

The petitioner's wife, Dr. Magdalena Retsagi Berenyi, testified in support of her own petition for naturalization which was heard jointly with that of the petitioner and which was granted. She came from a well-to-do family whose business and property had been confiscated by the Communist government (A 106). Indeed her mother, father and two younger sisters had left Hungary in 1948 and came to the United States to escape the Communist regime (A 104). They were permitted to leave because her father was a Czech citizen and travelled on a Czechoslavakian passport and his wife and children under eighteen were permitted to accompany him (A 104, 109, 110). Magdalena Berenyi also applied for an exit permit but was refused because she was over eighteen years of age (A 104). She described the hatred which both she and her husband had for Communism and the Communist government of Hungary and their constant desire to leave the country and achieve freedom (A 110-112).

A further witness for the petitioner was Lorand De Bickish, a former Hungarian national who was a naturalized citizen of the United States and was a project engineer residing in Newton, Massachusetts (A 121). Mr. De Bickish was an avowed anti-communist who had been arrested twice (A 124) and imprisoned on one occasion for

six months for attempting to escape from Hungary in 1948. Also, his brother was a broadcaster for Radio Free-Europe in Munich and in 1955 he was exiled for four months to a small town in eastern Hungary because he maintained contact with his said brother (A 125). During that exile, the petitioner and his wife were the only persons who visited him (A 125). They also were the godparents of his child (A 126). He first met the petitioner in 1950, having previously been a friend of petitioner's wife (A 126). He described how he and the petitioner often discussed politics and the petitioner always voiced views opposing Communism and the Hungarian government (A 127). They used to listen clandestinely to Radio Free Europe, the Voice of America and B. B. C. together, which was forbidden by the government (A 127). On many occasions they talked together of leaving Hungary and escaping to freedom (A 128).

Another witness for the petitioner was Dr. Ilona Raditz Ring, resident pathologist at Temple University, who was also a former Hungarian national and had become a naturalized United States citizen (A 73, 79). She was formerly a student at the University of Budapest Medical School, having been two years senior therein to the petitioner and his wife, and having graduated therefrom in 1950 (A 73, 75). Following her graduation, she had been a faculty member at the medical school (A 78). She testified that from about 1949 or 1950 on, she saw petitioner about once a month and had occasion to discuss with him the political problems of the country (A 74, 75). The petitioner often expressed his opposition to Communism to her and his desire to leave Hungary and go to a free country

(A 76, 77). In the United States, petitioner had often expressed his happiness and gratitude at being here (A 80).

Mrs. Charlotte Ray, the mother-in-law of petitioner testified that she had left Hungary in 1948 together with her husband and two younger daughters and had become a naturalized United States citizen in 1954 (A 132, 133). Her husband had a large textile manufacturing business which had been nationalized by the Hungarian government without compensation. She had every reason to be and was bitterly opposed to Communism (A 133, 134). She first met the petitioner in December of 1956 when he came to this country as her oldest daughter's husband (A 135). Since that time, the petitioner had on many occasions in her presence expressed his hatred for Communism and his love for this country and the freedom which it offered (A 136).

Paulette Farkas, a naturalized United States citizen, who was the aunt of Magdalena Berenyi, testified that she had lived in the same apartment in Budapest with the petitioner and his wife following their marriage in 1952 until they left the country in 1956 (A 137, 138). She and her husband escaped into Austria together with the petitioner and his wife (A 138). She knew the petitioner since 1950, and between that time and their exit from the country, she had on numerous occasions discussed the political conditions that existed. Petitioner always expressed his opposition to Communism and his desire for freedom (A 138, 139).

The testimony of the last witness for the petitnoner, Harry Flam, a brother-in-law, was stipulated to between counsel to the effect that he would testify that petitioner

was of good moral character, opposed to Communism and attached to the principles of the constitution (A 139, 140).

2. *The Adverse Testimony*

The government produced two witnesses whose testimony was offered in opposition to the petition. The first government witness was Dr. Pal Halasz, a physician and surgeon, who resided in Peoria, Illinois. He had attended the University of Budapest Medical School between 1949 and 1955 and knew the petitioner therefrom (A 14). The witness had himself been a member of the Communist party between 1948 and 1956 (A 18). While he was at the university, Communist party meetings were held about once a month, but he did not attend all of them (A 19, 20). He testified that he saw the petitioner at some meetings in 1950 or 1951, and when asked to be specific, he stated at perhaps two or three meetings and indeed was not even certain it was more than one (A 21, 31). He had no specific memory of what occurred at any meeting which petitioner attended (A 31). He did not recall whether these meetings were open or closed (A 32). Most of the time the Communists invited the attendance of students whom they wished to indoctrinate (A 36). These visitors would not be identified as non-members (A 36). When a person was invited to attend it was a must that he do so or risk dire consequences (A 24, 25). The petitioner was an outstanding student and the Communists would naturally have sought to recruit him (A 29). He had never seen a party membership card of the petitioner though he had on occasions been the doorkeeper at meetings (A 27, 30), nor had he ever seen petitioner's name listed in any party records (A 30), nor did he recall the petitioner ever speaking or

voting at such meetings (A 26, 27, 32). Indeed, Halasz testified that he did not know whether petitioner was or was not a member, but merely assumed that he was because he saw him at meetings (A 34). He knew, in fact, that petitioner was actually opposed to Communism and had heard him speak against the Communist party and the regime (A 33, 34).

The second government witness was Dr. Gyorgy Kury, a physician residing in Brookline, Massachusetts (A 37). He had attended medical school at the University of Budapest commencing in the same class with petitioner in 1946, but during the first two years had no contact with him (A 38, 43, 44, 46). In September of 1948, he was assigned to a small study group of about twenty students which met every afternoon (A 50). The purpose for these groups was the study of medical subjects and also political orientation (A 46, 50, 51). The witness attended only one meeting of a group wherein the petitioner was also a member before transferring to another group (A 53). At this meeting in September of 1948, while the members told each other something of their respective backgrounds (A 51), the witness stated that he heard the petitioner tell the group that he was a member of the Communist party since 1945, following the Soviet occupation of the country, and that he was to be their instructor in Marxism-Leninism and was responsible for their ideological education (A 40, 41, 51). Petitioner also was said to have told the group to read Soviet books, see Soviet movies and discuss the news (A 42, 52). Petitioner spoke for about five minutes on that occasion (A 51). Dr. Kury never attended a meeting of this study group again, having thereafter transferred to another group (A 53). He did not remember the exact words used

by petitioner on this occasion and did not remember the names of any other persons in the group (A 51, 52). He had made no notes of this event (A 51). Except for this one occasion he had never heard petitioner state that he was or had been a Communist (A 53) and he had no close contact with the petitioner thereafter (A 58, 60).

In addition to the foregoing testimony certain documentary exhibits were entered into evidence which consisted mainly of the transcripts of prior testimony by the petitioner and the government witnesses taken before the Immigration and Naturalization Service. The testimony contained therein was in the main substantially the same as the trial testimony and added nothing of a consequential nature thereto.

C. District Court's Findings of Fact and Conclusions of Law

Based upon the above evidence, the District Court made certain specific findings of fact which were contained in its opinion dated March 29, 1965, which, although not separately numbered, were, insofar as herein pertinent, as follows:

1. That the petitioner became a member of the Communist party in Hungary in 1945.

2. That the petitioner remained a member of the Communist party for an indefinite number of years.

3. That the petitioner attended closed meetings of the Communist party.

4. That the petitioner was in charge of instruction in communist ideology and student study group meetings for an undetermined period of time.

Based upon the findings of these subordinate facts, the District Court found as ultimate facts that the petitioner knowingly testified falsely before the Immigration and Naturalization service on three occasions within the statutory period required for good moral character when he denied membership in the Communist party and was, therefore, not a person of good moral character within the meaning of the Immigration and Nationality Act.

As its conclusion of law, the District Court held that on the basis of the facts which it found, as hereinabove set forth, the petitioner had failed to establish that during the required statutory period he had been and still was a person of good moral character within the meaning of the Immigration and Nationality Act (A 259-265).

D. Opinion of the Court of Appeals

The Court of Appeals affirmed the order of the District Court on the ground that the petitioner had failed to sustain his burden of proving that he possessed the statutory qualifications for naturalization, and more specifically the qualification of good moral character during the required statutory period. While the Court of Appeals conceded that the petitioner had made out a prima facie case of good moral character, it held that the District Court's belief of the adverse testimony satisfied the government's burden of going forward following the presentation of the prima facie case, and that the said Court was therefore justified in holding that the petitioner had failed to sustain his overall burden of proof. It concluded that in according due weight to the opportunity of the trial judge to observe the conduct and demeanor of the witnesses, it could not as a

matter of law find the conclusion of the District Court to have been clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

1. The judgment at bar is based upon a complete failure to consider the substantive content of the testimony that was offered in opposition to the petition and its relation to the testimony as a whole in the entire proceeding. The crux of the District Court's decision herein was its finding that the petitioner had been a member of the Communist Party of Hungary. Lacking such finding, it could not have proceeded to find that the petitioner had given false testimony in denying such membership and that he was therefore not a person of good moral character within the meaning of Sections 101(f)(6) and 316(a) of the Immigration and Nationality Act of 1952.

It is apparent that the District Court's finding of the petitioner's Communist Party membership is based solely upon the testimony of the witness Kury. Kury's testimony, in turn, is founded solely upon an alleged oral admission purportedly made by the petitioner on a single occasion of five to ten minutes duration more than sixteen years prior to the final hearing herein. There is absolutely no corroboration of Kury's testimony in this regard whatsoever. There is similarly no other testimony or evidence at all which in any respect would tend to prove petitioner's membership in the Communist Party or participation in activities in furtherance of the Communist cause.

The inherent weakness in the evidentiary value of such an extrajudicial admission which concerns the main con-

troverted fact of a case, standing alone, is recognized by Wigmore in his treatise. Wigmore on Evidence, Third Edition, Volume IV, Sections 1055 and 1056.

Of course, the insidious nature of such testimony lies in the fact that it places the petitioner in the impossible position of having to prove a negative proposition.

All that the petitioner could possibly do to counter the testimony of Kury was to present to the Court through his own testimony and the testimony of such witnesses as were available, a complete and candid picture of his entire background and history. The entire tenor of his personal life and associations militate against the thrust of Kury's testimony. He categorically and repeatedly denied that he had ever made the statements attributed to him by Kury or that he had ever held any membership or position in the Communist Party or any other political organization. His religious training, upbringing and continued observance would appear to be completely inconsistent with any membership in the party. Indeed, in the year 1945, when petitioner was found by the District Court to have joined the party, he was sixteen years old. The testimony of the petitioner's witnesses, including persons who themselves had suffered deprivation of liberty and property at the hands of the Communist regime and had every reason to detest Communism, was unqualifiedly in support of the petitioner's case.

But perhaps the strongest testimony in support of the petitioner was that given by the government's other witness, Halasz. Halasz was himself an admitted member of the Communist Party who knew the petitioner much more

closely than Kury. He could not, however, truthfully state that the petitioner had even been a member of the party. He stated that the possible one, two or three occasions that he saw the petitioner in attendance at a meeting, could very well have been open meetings to which petitioner had been invited and which, under the circumstances then existing in Hungary, he was compelled to attend. Indeed, Halasz stated that he knew the petitioner's actual views to be extremely anti-Communist.

In addition to all of this testimony in support of the petitioner, was the complete absence of any objective evidence to prove his membership in the Communist Party. There was no testimony that he ever held a membership card therein, paid any party dues, voted at any party meetings, participated in any party discussions, nor was his name seen in any party records.

Indeed, even if the testimony of Kury was to be believed as against the weight of all of the other evidence, it would only prove that the petitioner made the statement attributed to him by the said witness. It would certainly in no way prove the truth of the content of the said statement. It is of further interest to note that the meeting at which Kury claimed such statement to have been made by the petitioner, was never even alleged to have been a Communist Party meeting.

It is thus respectfully submitted that the finding of petitioner's membership in the Communist Party is clearly erroneous in that it is in conflict with the holding of this Court in *United States* v. *United States Gypsum Co., et al.*, 333 U.S. 364, 395, and decisions from other circuits which

have followed it, to wit: *United States* v. *Kaplan*, 277 F. 2d 405 (5th Cir., 1960) and *Simpson* v. *United States*, 322 F. 2d 688 (5th Cir., 1963).

2. A further reason for the granting of certiorari herein is that the judgment at bar has in effect determined an important question of federal law which has not been, but should be settled by this Court. The question involved is the nature and quality of evidence by which a petitioner for naturalization may be judicially found to have been a member of the Communist Party so as to bar him from naturalization. While the order denying naturalization was technically based upon a lack of good moral character resulting from a denial of membership, there is no doubt that the said conclusion was premised upon the finding of membership, and as such, the said finding lies at the heart of the instant case.

In *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, *Rowoldt* v. *Perfitto*, 355 U.S. 115 and *Scales* v. *United States*, 367 U.S. 203, 222, this Court appeared to hold that in deportation and *Smith Act* proceedings, membership in the Communist Party must consist of a "meaningful association" which amounted to more than nominal listing of the person's name on the party rolls.

The record in the case at bar is of course completely barren of any evidence pertaining to such "meaningful association" on the part of the petitioner.

While it is of course true that the burden of proof in deportation and criminal proceedings does not apply in naturalization proceedings, it is submitted that the substantive principles enunciated by this Court in the above cited

cases with respect to the meaning of Communist Party membership, control the determination of the question of such membership regardless of the nature of the proceeding.

Indeed the language of Section 241(a)(6)(c) of the Immigration and Nationality Act of 1952, which was construed by this Court in the *Gastelum-Quinones* case, is identical with the language of Section 313(a)(2) of the Act which bars a member of the Communist Party from naturalization, except that the former pertains to deportation.

3. The importance of the right to naturalization and the basis upon which it was denied in the case at bar, furnishes an additional ground for the grant of certiorari. A denial of citizenship particularly to an alien such as the petitioner who has fled a hostile regime in his native country, is a grave and serious matter. Such denial not only deprives the applicant of the security which a citizen possesses against the possibility of deportation but also prevents the applicant from joining fully in the affairs of his new adopted land. This situation is all the more compelling in view of the fact that petitioner's wife was granted citizenship in the joint final hearing in the District Court that resulted in the denial of the petitioner's application.

CONCLUSION

This petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

CHARLES SPAR
LEON B. SAVETSKY
Attorneys for Petitioner

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6531.

KALMAN J. BERENYI,

PETITIONER, APPELLANT,

v.

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* MCENTEE, *Circuit Judge,* and CAFFREY, *District Judge.*

Charles Spar, with whom *Leon B. Savetsky* and *Spar and Burroughs* were on brief, for appellant.

Stanislaw R. J. Suchecki, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.,* United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

November 1, 1965.

MCENTEE, *Chief Judge.* This is an appeal by one Kalman J. Berenyi from a final order of the United States

District Court for the District of Massachusetts denying his petition for naturalization. The petitioner, a Hungarian national was born in Budapest in 1928. He received his early education there and in 1946 entered the Medical School at the University of Budapest. The Russian troops first occupied Hungary in 1945 and it is apparent from the record that during the time of the petitioner's attendance at the university it had become subjected to strong Communist influence and pressure. In 1949, while still a student at the medical school, the petitioner joined the Hungarian army which was then under Communist domination and control. While in the army he continued his medical studies at the university and after graduation in 1952 became a medical officer. When he left the army in 1956 he had attained the rank of captain. The petitioner did not participate in the unsuccessful Hungarian uprising against the Russians in 1956 but in the confusion that resulted from it he and his wife fled from Hungary into Austria in the fall of 1956 and from there came to this country. The record shows that they were admitted to the United States for permanent residence on December 4, 1956. Immediately after his arrival here the petitioner resumed his medical career in various hospitals in New York and New Jersey and moved to Massachusetts in 1959 where he and his wife presently reside.

On January 30, 1962, the petitioner filed his "Application to File Petition for Naturalization" in the United States District Court in Boston. This application, which was made under oath, contained amongst others, the following question:

> "Have you ever, in the United States or in any other place, (a) been a member of, or in any other way connected with, or associated with the Communist party either directly or indirectly through another organization, group or person?"

To this question the petitioner answered "No." The record further shows that a few days later on February 2, 1962, in Boston, the petitioner stated under oath to an officer of the Immigration and Naturalization Service in connection with his said application that he had never been a member of the Communist party either in the United States or in any other country. On May 22, 1962, the petitioner again testified under oath before an officer of the Immigration and Naturalization Service, this time in connection with his petition for naturalization, that he had never been a member of the Communist party. The naturalization examiner who conducted the preliminary hearing in this case, after a review of the evidence, found the above statements to be false and recommended that the petition for naturalization be denied under 8 U.S.C. §§ 1101 and 1427, the pertinent portions of which are hereinafter set forth. Thereupon, on demand of the petitioner, the district court required the examination of the petitioner and witnesses under oath before the court and in the presence of the court pursuant to 8 U.S.C. § 1447(b). At this hearing the petitioner testified at length and also produced several witnesses in support of his petition. The respondent produced two witnesses in opposition thereto. The record of the preliminary hearing before the naturalization examiner was also before the court by agreement of the parties. On the

issue of whether the petitioner had ever been a member of th Communist party in Hungary, the first government witness, Dr. Pal Halasz, testified that he had attended the University of Budapest Medical School between 1949 and 1955 and knew the petitioner while there; that he himself had been a member of the Communist party between 1948 and 1956; that while he was at the university Communist party meetings were held there about once a month; that he did not attend all of them but that he saw the petitioner at some meetings in 1950 or 1951. The second government witness, Dr. Gyorgy Kury, testified that he was a classmate of the petitioner at the medical school; that the witness was assigned to a small group of about twenty students which met every afternoon for the purpose of study of medical subjects and also for political orientation; that the petitioner was also a member of this group; that in September of 1948 Kury attended a meeting of this group at which he heard the petitioner tell the group that he was a member of the Communist party since 1945 following the Soviet occupation of the country; that he was to be their instructor in Marxism-Leninism and was responsible for their ideological education; that the petitioner also encouraged the group to read Soviet books, see Soviet movies and discuss the news.

The petitioner testified that he had never been a member of the Communist party of Hungary or of any other country and denied ever having made the statements attributed to him by Dr. Kury or that he was ever a political leader of any student or other group. He further testified to his opposition to Communism, his loyalty and attachment to the United States and his willingness to bear arms for this

country. For the most part, the witnesses for the petitioner testified to statements made by the petitioner to them individually during the period between 1949 and 1956 of his opposition to Communism and his love for freedom.

In addition to other findings of fact, the court found that the petitioner became a member of the Communist party in Hungary in 1945 and remained a member for an indefinite number of years; that in the three instances above mentioned the petitioner gave false testimony for the purpose of facilitating his naturalization and obtaining the benefits of United States citizenship and therefore was not a person of good moral character within the meaning of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6) and § 1427(a)(3).[1] On the basis of these findings the court concluded that the petitioner had failed to establish his compliance with the statutory requirement of good moral character and denied the petition.

It is well settled that the petitioner in these cases has the burden of proving that he possesses each of the statutory qualifications for citizenship. *United States* v. *Schwim-*

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[1] The pertinent portions of 8 U.S.C. § 1101 provide:

"(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

"(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter; . . . ."

8 U.S.C. § 1427 provides:

"(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, . . . (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

mer, 279 U.S. 644, 649 (1929). A good moral character during the five year period immediately preceding the filing of his petition for naturalization is one of these statutory qualifications. 8 U.S.C. § 1427(a). No person who has given false testimony during this period for the purpose of obtaining any benefit under the Immigration and Nationality Act shall be regarded as, or found to be a person of good moral character. 8 U.S.C. § 1101(f)(6).

This petitioner as a part of his original application for a petition for naturalization and also in connection with his petition for naturalization itself, flatly stated that he had never been a member of the Communist party in Hungary or elsewhere. The government introduced testimony contradicting these statements. The petitioner's oath subscribing to his petition made out a prima facie case that his character was good. *Krausse* v. *United States,* 194 F. 2d 440 (3d Cir. 1952). "Prima facie" evidence does not shift the burden of proof, see *Commissioner* v. *Young Motor Co.,* 316 F.2d 267, 271 (1st Cir. 1963), but it did impose a burden on the government of going forward. *Krausse* v. *United States,* supra; see *Epstein* v. *Boston Housing Authority,* 317 Mass. 297, 302, 1944, and cases cited. The court's belief of the evidence that petitioner had been a Communist adequately satisfied that burden. As a result the district court found that the petitioner failed to sustain his burden of proof. We must affirm unless we find that this determination was clearly erroneous, and in our consideration of that question we must accord due weight to the opportunity of the district judge to observe the conduct and demeanor

of the witnesses and particularly the conduct, demeanor and credibility of the petitioner himself. On the basis of a careful review of the entire record in this case we cannot find the clear error which we are obliged to find under Rule 52(a) of the Federal Rules of Civil Procedure if we are to set aside the final order of the district court.

Judgment will be entered affirming the order of the district court.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6531.

KALMAN J. BERENYI,

PETITIONER, APPELLANT,

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

RESPONDENT, APPELLEE.

JUDGMENT

November 1, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD,

Clerk.

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